SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 648

CHARLES W. LEEPER, I. P. FARRAR, SADLER S. GLADDEN, ROBERT H. GREENE, JAMES HEATH, HENRY M. ISLEY, RUSSELL McLAUGHLIN, ANTHONY M. WALKER, HAROLD WALKER, EDWARD J. WEDDINGTON, JAMES J. WEDDINGTON, WILLIE LEE WEDDINGTON, L. A. WARNER, G. M. WILKINS, ROY S. WYNN AND RUDOLPH M. WYCHE, *Petitioners,*

v.

CHARLOTTE PARK AND RECREATION COMMISSION, A MUNICIPAL CORPORATION, OSMOND L. BARRINGER, ABBOTT REALTY COMPANY, A CORPORATION, AND CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, *Respondents*

BRIEF OF RESPONDENT OSMOND L. BARRINGER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Does the interpretation of a deed by a state court constitute state action within the contemplation of the Fourteenth Amendment to the Constitution of the United States?

Argument

The respondent Barringer respectfully submits that this Court should deny the petition for writ of certiorari for that:

I

Petitioners were not necessary parties to this proceeding.

II

Property law only is involved in this case.

III

Petitioners are not aggrieved by the North Carolina Supreme Court decision.

IV

There is no state action involved in this proceeding.

V

Petitioners have not exhausted other legal remedies which they have in the State of North Carolina.

Points and Authorities

I

Petitioners were not necessary parties to this proceeding.

This action was instituted in the Superior Court of Mecklenburg County, North Carolina, by the Charlotte Park and Recreation Commission under the North Carolina Uniform Declaratory Judgment Act. Section 1-254 of that Act provides in part that "Any person interested under a deed . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof." Section 1-260 of the Act provides in part that "When declaratory judgment is sought, all persons shall be made parties who have or claim

any interest which would be affected by the declaration . . ." 1A, *General Statutes of North Carolina,* Sections 1-254, 1-260.

A reference to the Complaint which was filed in this case (Record 2) shows that Charlotte Park and Recreation Commission instituted the proceeding for the purpose of having the Court declare whether or not the reverter clauses in the deeds referred to therein were valid, whether or not the rights of reverter in said deeds were enforceable, and if Charlotte Park and Recreation Commission should permit persons other than white people to use the lands comprising Revolution Park, whether the same would revert to the grantors named in the deeds.

The only parties who were necessary and indispensable to the action were the plaintiff, Charlotte Park and Recreation Commission, grantee, and the defendants, O. L. Barringer and wife, Abbott Realty Company, and City of Charlotte, grantors in the deeds to be construed.

The petitioners herein were made parties defendant to this suit in order that their contentions might be presented to the court. (See Exhibit X, Record 82.)

None of the necessary parties to this proceeding has petitioned this Court for writ of certiorari. Only the petitioners who were not necessary parties to the action seek to have this Court review the North Carolina Supreme Court decision.

II

Property law only is involved in this case.

A careful examination of the facts in this case shows that property law only is involved. This Court has scrupulously adhered to the rule that the highest court of a state may administer the common law according to its own understanding and interpretation (see *American Ry. Express Co.* v. *Commonwealth of Kentucky,* 273 U. S. 269 (1927)) and

especially where the law which is being administered by the state tribunal is property law. See *Tyler* v. *U. S.*, 281 U. S. 497 (1930); *Warburton* v. *White*, 176 U. S. 484 (1900).

The North Carolina Supreme Court construed and interpreted the Barringer deed, and its holding that the estate created by the deed is a fee determinable upon special limitations is an authoritative declaration of what the law is with reference to its own property rules and should not under any circumstance be reviewed by this Court. See *Burgess* v. *Seligman*, 107 U. S. 20 (1883).

III

Petitioners are not aggrieved by the North Carolina Supreme Court decision.

The property conveyed by the Abbott deed to the Charlotte Park and Recreation Commission will not revert if Negroes use the Bonnie Brae Golf Course. (Petition for Writ, Appendix A, 35.)

The reverter provision in the deed from the City of Charlotte to the Charlotte Park and Recreation Commission is void. (Petition for Writ, Appendix A, 36.)

Certainly the petitioners are not aggrieved by these two facets of the North Carolina decision.

The reverter provision in the deed from Barringer and his wife to the Charlotte Park and Recreation Commission is valid and will become operative by its own limitation if Negroes use the Bonnie Brae Golf Course or any part of the land comprising Revolution Park for golf purposes. (Petition for Writ, Appendix A, 34.) There is only one golf course on the land comprising Revolution Park, and that is the Bonnie Brae Golf Course. (Record 93.) The Bonnie Brae Golf Course is not located on property which is included in the Barringer deed (Paragraph 14, Record 63), and title to the Bonnie Brae Golf Course property will

remain in Charlotte Park and Recreation Commission whether or not Negroes use the golf course.

It is true that the prayer in the Complaint filed in this proceeding contained a broader question than that answered by the Court—that is, whether or not the use by any persons other than white people of the lands comprising Revolution Park will cause the property conveyed by Barringer, Abbott Realty Company and the City of Charlotte to revert. However, the petitioners herein demanded only that they be given the right to play golf upon the municipal golf course (Paragraph 16, Record 5; Exhibit IX, Record 74), and the Supreme Court of North Carolina confined its holding to this very precise question, namely, whether the use by Negroes of Bonnie Brae Golf Course or any part of the land comprising Revolution Park for golf purposes will be the event which will cause the reverter to become effective. And since title to the Bonnie Brae Golf Course itself is not affected by this decision, it is difficult to see in what way the petitioners herein have been aggrieved.

This Court has said that a party is not aggrieved by the decision unless he can show some direct injury and that he is not aggrieved because he may suffer in some indefinite way in common with people generally. See *Doremus* v. *Board of Education,* 342 U. S. 429 (1952). If the property which Barringer gave to the Charlotte Park and Recreation Commission should revert to him, the petitioners as taxpayers may suffer with other taxpayers and citizens of the City of Charlotte. But they have not stated that their participation in this action is as taxpayers. The petitioners herein have no substantial appealable interest herein. They are merely nominal parties to this action, and nominal parties to an action cannot appeal. See *Hamilton Trust Co.* v. *Cornucopia Mines Co.,* 223 Fed. 494 (9th Cir. 1915), cert. denied 239 U. S. 641 (1915).

IV

There is no state action involved in this proceeding.

The North Carolina Supreme Court has neither executed nor enforced the provisions of the Barringer deed. The North Carolina Supreme Court has simply recognized the type estate which was created by the deed. Certainly there can be no execution or enforcement of the provisions of a deed by the mere recognition of the estate which it created, which type estate has been used in land law since the twelfth, thirteenth and fourteenth centuries and which type estate is recognized in North Carolina and in nearly thirty other states of the United States. See 2 *Powell on Real Property* Sec. 178 and Sec. 187, n. 93 (1950). Nor can the term "state action" as used by this Court in *Shelley* v. *Kraemer,* 334 U. S. 1 (1947), be so enlarged as to include the recognition of such an estate and its automatic termination by virtue of its own limitation and the reversion of the estate to the grantor. The deed in question was executed by Barringer and his wife and delivered by them in 1929, and the provisions were placed therein by Barringer, not by the State. Barringer has never contended that the reverter clause is invalid. He did not institute this action. The plaintiff Charlotte Park and Recreation Commission presented no contention that the reverter clause was invalid. The Charlotte Park and Recreation Commission only requested the Court to determine its validity and the event which would cause the fee to determine and the reverter to become operative. The Charlotte Park and Recreation Commission, plaintiff in the declaratory judgment action, and the defendants therein other than the petitioners herein have accepted the ruling of the Supreme Court of North Carolina.

In their Petition for Writ of Certiorari, petitioners state: "If the Commission should fail to obey the state court judgment by refusing to yield possession to Barringer on the occurrence of this event, ample judicial sanctions will be available to compel obedience, . . ." (Petition for Writ 10, 11.) The respondent Barringer respectfully submits that the petitioners are now asking this Court to consider a possibility which under the facts of this case will never come up. In the agreed statement of facts which was signed by counsel for Charlotte Park and Recreation Commission, by counsel for City of Charlotte, by counsel for Barringer, by counsel for Abbott Realty Company, and by counsel for defendants who are petitioners in this matter, Charlotte Park and Recreation Commission stated that it did not desire to fail to comply with the terms of any gifts made to it by any of its citizens or others. (Record 66.) Under the decisions of the North Carolina Court, if Negroes use the golf course, the estate which was conveyed to Charlotte Park and Recreation Commission by Barringer and his wife will cease and determine and the property will revert to Barringer. At that time and only at that time and then only if Charlotte Park and Recreation Commission should fail to yield possession would any action on the part of Barringer be necessary. And if action were necessary, that action could well be self-help on the part of Barringer in the form of exercising his right of entry by occupying the property (see *Brittain* v. *Taylor*, 168 N. C. 271, 84 S. E. 280 (1915)) rather than any form of state action. Since the Charlotte Park and Recreation Commission has already stated, however, that it does not desire to fail to comply with the terms of any gifts made to it by any of its citizens or others, it would seem that the possibility which has been brought to the attention of this Court by petitioners is far too remote for consideration.

V

Petitioners have not exhausted other legal remedies which they have in the State of North Carolina.

The respondent Barringer also respectfully calls to the attention of this Court the suit which is now pending in the Superior Court of Mecklenburg County, North Carolina, which was filed against Charlotte Park and Recreation Commission and others by petitioners herein subsequent to the institution of this declaratory judgment action, whereby petitioners herein in that action seek a declaratory judgment and an injunction restraining Charlotte Park and Recreation Commission, the City of Charlotte, and certain officials from refusing, because of his race and color, the admission of any of the petitioners herein, or any other Negro similarly situated, to the Bonnie Brae Golf Course. (Paragraph 20, Record 65; Petition for Writ 5.) It is obvious, therefore, that the petitioners herein have other legal remedies available to them in the State of North Carolina which they have not exhausted. In the case which the petitioners herein have instituted in the Superior Court of Mecklenburg County, North Carolina, and herein referred to, they may rely on this Court's recent decision in the case of *Mayor and City Council of Baltimore City* v. *Dawson*, U. S. , 100 L. Ed. (adv.p.75)(1955), in which decision this Court affirmed the decision of the United States Court of Appeals, Fourth Circuit, to the effect that racial segregation in recreational facilities can no longer be sustained as a proper exercise of the police power of the state, and they may also rely on this Court's action in the case of *Holmes* v. *City of Atlanta*, U. S. , 100 L. Ed. (adv. p.76) (1955), in vacating the judgments of both the United States Court of Appeals, Fifth Circuit, and the District Court. It would appear that the petitioners herein have

but to pursue the remedies open to them in the case which they have instituted in the Superior Court of Mecklenburg County, North Carolina, and which is now pending there in order to gain admission to the Bonnie Brae Golf Course.

This respondent respectfully submits that the petitioners herein have confused the two cases in which they are parties. This case in which they have petitioned this Court for a writ of certiorari involves an interpretation and construction of a deed and was determined by an authoritative declaration by the highest tribunal of North Carolina with reference to its own property rules. No state action is involved in the proceeding which they would have this Court review. The case which these petitioners have instituted in the Superior Court of Mecklenburg County, North Carolina, against Charlotte Park and Recreation Commission, the City of Charlotte, and others and which is now pending and in which the petitioners herein seek a declaratory judgment and an injunction restraining Charlotte Park and Recreation Commission, the City of Charlotte, and certain officials from refusing, because of his race and color, the admission of any of the petitioners herein or any other Negro similarly situated to the Bonnie Brae Golf Course, involves issues which the petitioners herein have sought to insert in this proceeding, and the authorities which petitioners have set out in their brief in this proceeding with reference to the Fourteenth Amendment to the Constitution of the United States are applicable not to this proceeding but to the action which is now pending in the Superior Court of Mecklenburg County, North Carolina, in which petitioners herein are plaintiffs, and which has not yet been tried.

Conclusion

This Court has said that the requirements for a justiciable case or controversy are no less strict in a declaratory judg-

ment proceeding than in any other type suit; that this Court is without power to give advisory opinions; that its considered practice is not to decide abstract, hypothetical or contingent questions or to decide any constitutional question in advance of the necessity for its decision or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied or to decide any constitutional question except with reference to the particular facts to which it is to be applied; and that the declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered. See *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945). Under these criteria this Court should not grant petitioners' petition for writ of certiorari.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the petition for writ of certiorari should be denied.

Dated February 14, 1956.

Respectfully submitted,

FRANK THOMAS MILLER, JR.,
Counsel for Respondent,
Osmond L. Barringer.

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Of Counsel.

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